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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 885

CENTRAL POWER AND LIGHT COMPANY, WEST TEXAS UTILITIES COMPANY, AND SOUTHWESTERN GAS AND ELECTRIC COMPANY,

Appellants,

vs.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT, STATE OF TEXAS.

STATEMENT AS TO JURISDICTION ON APPEAL.

Central Power and Light Company, West Texas Utilities Company, and Southwestern Gas and Electrict Company, the above named Appellants, submit this Statement in accordance with Rule 12 of the Rules of this Court, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review this cause on appeal from the final judgment entered herein by the Court of Civil Appeals for the Third Supreme

Judicial District of Texas, sustaining an Act of the Legislature of the State of Texas as applied to them, challenged as being repugnant to the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully pointed out.[1]

I.

Statutory Provisions Sustaining Jurisdiction.

1. This Court has jurisdiction of this appeal under Section 237 of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 344(a)), which provides that,—

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error * * *."

2. Pursuant to the Act of January 31, 1928 (45 Stat. 54; U. S. C. A. Title 28, Sec. 861(a)), as amended by the Act of April 26, 1928 (45 Stat. 455; U. S. C. A. Title 28, Sec. 861 (b)), the present appeal is brought in lieu of a writ of error.

II.

Statute of the State, the Validity of Which Is Involved.

The Statute of Texas (Chapter 400, page 1589, General Laws, First Called Session, 44th Legislature, 1935, and known as the Texas Chain Store Tax Law), the validity of

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[1] The opinion of the State Court (copied as Appendix "A" hereto) expressly shows that these Federal questions were raised and were duly considered and decided by the court.

which is herein involved, as applied to the three corporation defendants under the facts of this case is, in so far as relevant, as follows:

"Sec. 5. Every * * * corporation opening, establishing, operating or maintaining one or more stores * * * within this State, under the same general management or ownership, shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores * * *

"The license fees herein prescribed shall be as follows:

"1. Upon one (1) store the license fee shall be One Dollar ($1);

"2. Upon each additional store in excess of one (1) but not to exceed two (2), the license fee shall be Six Dollars ($6);

"3. Upon each additional store in excess of two (2) but not to exceed five (5), the license fee shall be Twenty-five Dollars ($25);

"4. Upon each additional store in excess of five (5) but not to exceed ten (10), the license fee shall be Fifty Dollars ($50);

"5. Upon each additional store in excess of ten (10) but not to exceed twenty (20), the license fee shall be One Hundred Fifty Dollars ($150);

"6. Upon each additional store in excess of twenty (20) but not to exceed thirty-five (35), the license fee shall be Two Hundred Fifty Dollars ($250);

"7. Upon each additional store in excess of thirty-five (35) but not to exceed fifty (50), the license fee shall be Five Hundred Dollars ($500);

"8. Upon each additional store in excess of fifty (50), the license fee shall be Seven Hundred Fifty Dollars ($750); * * *"

"Sec. 5a. Every * * * corporation * * * opening, establishing, operating and/or maintaining one or more stores * * * under the same general management and/or ownership, and selling therein any equipment or appliances operated and/or used in connection with any electrical current * * * shall pay the license fees hereinabove prescribed for the privilege of opening, establishing, operating and/or maintaining such stores * * *"[2]

"Sec. 6. The provisions of this Act shall be construed to apply to every person, agent, receiver, trustee, firm, corporation, co-partnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"Sec. 7. The term 'store' as used in this Act shall be construed to mean and include any store or stores or any mercantile establishment or establishments not specifically exempted within this Act which are owned, operated, maintained, or controlled by the same person, agent, receiver, trustee, firm, corporation, co-partnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, at retail or wholesale."

III.

Date of Judgment and Date of Presentation of Application for Appeal.

1. The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas sought to be here reviewed was entered on October 28, 1942. Appellants' motion for rehearing was filed within fifteen days, as authorized by Rule 458, Texas Rules of Practice and Pro-

[2] The opinion of the State court (copied as Appendix "A" hereto) does not disclose whether the stores of the three defendant corporations are taxed under Section 5 or under Section 5a; we have therefore copied both.

cedure in Civil Actions. The motion was entertained and overruled on November 18, 1942. Thereupon, within the time limited by law (Articles 1728 and 1729 Revised Civil Statutes of Texas, 1925, and Rule 468, Texas Rules of Practice and Procedure in Civil Actions), Appellants petitioned the Supreme Court of Texas to grant a writ of error and review the case. The petition was refused by the Supreme Court on January 6, 1943.

Appellants thereupon, within fifteen days as is authorized by Rule 515, Texas Rules of Practice and Procedure in Civil Actions, filed their motion for rehearing of the application for writ of error. This motion for rehearing was entertained by the Supreme Court of Texas and was overruled on February 3, 1943; whereupon the judgment of the Court of Civil Appeals here sought to be reviewed became final under the State law.[3]

The Court of Civil Appeals has possession of the record and is the "highest court of the State in which a decision in the suit could be had."

The following are samples of cases brought here from Courts of Civil Appeals in Texas:

T. & N. O. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111, 113;

St. Louis, S. F. & T. R. Co. v. *Seale*, 229 U. S. 156;

S. A. & A. P. R. Co. v. *Wagner*, 241 U. S. 476;

Zucht v. *King*, 260 U. S. 174;

Lone Star Gas Co. v. *State of Texas*, 304 U. S. 224.

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[3] When a petition for writ of error is filed, the petition and the original record are forwarded by the Clerk of the Court of Civil Appeals to the Clerk of the Supreme Court. (See Rules 472 and 473, Texas Rules of Practice and Procedure in Civil Actions.) The record is retained in the Supreme Court for fifteen days after the petition is refused awaiting the filing of a motion for rehearing, and then until the court has overruled any such motion that may be filed. It is then returned to the Court of Civil Appeals. (See Rule 484, Texas Rules of Practice and Procedure in Civil Actions.) True copies of the court rules here referred to are here appended as Appendix "B."

2. The date on which this application for appeal is presented is March 5, 1943.

IV.

The Nature of the Case and of the Rulings of the State Court Bringing This Case Within the Jurisdiction of This Court.

Under this heading will also be shown when and how the Federal questions sought to be reviewed were raised; the method of raising them, and the way in which they were passed upon by the State court as required by Amended Rule 12.

Nature of the Case.

In this suit Appellants challenge on grounds arising under the Federal Constitution as construed by the State courts and applied to them, an Act of the Texas Legislature copied under heading II.

This is a suit for alleged delinquent chain store taxes based on Chapter 400, page 1589, General Laws, First Called Session, 44th Legislature, 1935, brought by the State of Texas against three operating subsidiary public utility corporations: Central Power and Light Company (operating 45 stores), West Texas Utilities Company (operating 35 stores), and Southwestern Gas and Electric Company (operating 20 stores). Each of the defendants had paid the tax for the years 1936 to 1940, inclusive, based upon the number of stores owned and operated by each as separate chains. The suit was for the difference between the amounts paid and the amounts allegedly due based upon the total number of stores operated by the three defendants as a single chain. The State's contention that the stores operated by the three defendant corporations constitute one chain was based upon the fact that a majority of the stock of each was owned by Central and South

West Utilities Company, and that the three defendant corporations were therefore "controlled or held with others by majority stock ownership."

The State further contended that the additional tax liability accruing by virtue of grouping all of the stores in one chain was against the three corporations whose stores were so grouped. Appellants contended that if the stores of the three corporation defendants were grouped together for chain store tax purposes, then that the additional tax liability claimed was against the corporation which "controlled" the three corporation defendants "by majority stock ownership." The Appellants further contended that if their contention was not adopted, then that the Act, under the facts as construed and applied against the three corporation defendants, violated the due process and equal protection clauses of the Constitution of the United States.

The trial court, the Court of Civil Appeals and the Supreme Court of Texas sustained the State's contentions and overruled the contentions of the three corporation defendants. Judgment in the trial court was against the three corporation defendants for the additional taxes; judgment in the Court of Civil Appeals was an affirmance of the trial court's judgment; and the Supreme Court of Texas, by refusing to review the case on writ of error, sustained the trial court and the Court of Civil Appeals. The court's opinion was not based upon any non-Federal ground.

Nature of the Rulings of the State Court Bringing This Case Within the Jurisdiction of this Court

The Texas Chain Store Tax is on a graduated basis, ranging from $1.00 per store for a single store to $750.00 per store in excess of fifty stores. Central Power and Light Company during the period complained of owned 45 stores and the tax on a chain of 45 stores amounts to $10,897.00

per year, being approximately $242.00 per store per year. It did not own, operate, maintain or control any other stores.

West Texas Utilities Company during the period complained of owned 35 stores, and the tax on a chain of 35 stores amounts to $5,599.00 per year, being approximately $160.00 per store per year. It did not own, operate, maintain or control any other stores.

Southwestern Gas and Electric Company during the period complained of owned 20 stores, and the tax on a chain of 20 stores amounts to $1,842.00 per year, being approximately $92.10 per store per year.

Grouping the 100 stores together for chain store tax purposes, made an annual tax liability of $505.32 per store.

The three corporation defendants in the trial court, in the Court of Civil Appeals and in the Supreme Court, contended that this additional tax liability, by proper construction of Sections 5, 5a, 6 and 7, should be against the corporation which controlled the three defendant corporations by majority stock ownership, and not against the three corporation defendants. This contention was by each of the three courts overruled. In the trial court, in the Court of Civil Appeals and in the Supreme Court of Texas the three corporation defendants contended that placing the additional tax liability accruing by reason of grouping the stores belonging to the three corporation defendants as one chain against the three corporation defendants, violates the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. This contention was likewise overruled.

In other words, the State courts held that merely because a majority of its stock was held by a corporation likewise holding a majority of stock in other corporations owning stores, that Central Power and Light Company should pay a chain store tax of $505.32 per store rather than a chain store tax of approximately $242.00 per store; that West

Texas Utilities Company should pay a chain store tax of $505.32 per store rather than approximately $160.00 per store; and that Southwestern Gas and Electric Company should pay a chain store tax of $505.32 per store rather than $92.10 per store.

Neither defendant had any method by which it could control the number of stores owned and operated by either other defendant.

Who owns the majority stock in a corporation cannot be the criterion by which that corporation is taxed. This is no reasonable basis for a different classification; it is one based solely on ownership, which has been condemned.

V.

The Federal Question Relied on as Sustaining This Court's Jurisdiction Is Substantial.

In this case the Texas courts have held that the three corporation defendants shall pay more taxes merely because a majority of their stock is held by the same corporation. *In other words, the rate of taxation against the corporation may be made dependant upon who owns its stock.* It is just as reasonable to say that a corporation, a majority of whose stock is held by a negro, may be taxed at a higher rate than a corporation, a majority of whose stock is held by a white man.

We do not find that this question has been directly before any court under any similar Chain Store Act. We do find, however, that the Supreme Court in *State Board of Tax Commissioners of Indiana et al.* v. *Jackson*, 283 U. S. 527, wherein was involved the constitutionality of the Indiana Chain Store Law, recognized the principle that if the distinction was solely one of ownership, that the law must fall as violative of the Fourteenth Amendment. Mr. Justice Roberts in speaking for the court said:

> "The court below fell into the error of assuming that the distinction between the appellee's business and that

> of the other sorts of stores mentioned, was solely one of ownership. * * * The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said, this is all that the Constitution requires. * * *"

Had the State courts placed the liability against the corporation which "controlled" the three corporation defendants "by majority stock ownership," then the Act would be valid. But to tax one corporation owner of chain stores differently from another corporation owner of chain stores, merely because of who may own a majority of stock in the first corporation owner, can under no circumstances be reasonable.

An exact parallel case in principle is *Independent Gasoline Co.* v. *Bureau of Unemployment Compensation* (Supreme Court of Georgia), 10 S. E. (2d) 58. The case involved the Georgia Unemployment Compensation Act, which provided:

> "Any employing unit which, together with one or more employing units, is owned or controlled (by legally enforceable means or otherwise), directly or indirectly by the same interests * * * and which, if treated as a single unit with such other employing units * * * is thereby an employer under paragraph 1 of this subsection."

The Georgia court held that the law, if construed as contended for by the State, was unconstitutional, saying:

> "But it is contended that the Legislature was authorized to place this defendant in a classification different from similar corporations and individuals, because of the fact that the owner of a majority of its stock owns a majority of the stock of another corporation, and that the two corporations are controlled by the same interest. This reasoning ignores the fact that this defendant is utterly powerless to determine who shall own its capital stock, or to fashion the business transactions and conduct of its stockholders.

"Since these are matters beyond the control of the corporation, they do not constitute a basis justifying the classification; and a classification must be reasonable and have a fair and substantial relation to the object of the legislation. It is contended, however, that the classification is justified as a means for enforcing the law and preventing its evasion. No doubt exists as to the right of the Legislature to enact any legal provision that will prevent evasion and aid in the enforcement of a legal enactment. But this rule should never sustain an act that places a burden upon innocent and helpless minority stockholders solely because of the status of the majority stockholder who might seek to evade his legitimate obligations under the statute. Such provision to the extent of the pro rata share of the tax borne by the minority stockholder enables the majority stockholder to escape his obligation. *If it is sought to prevent evasion, the fair and reasonable course would be to impose the entire tax burden upon the interest owning or controlling the different units.* Since this procedure would provide a complete means of enforcement and of preventing evasion, and since it would keep the burden of tax payment upon the actor whose conduct it is sought to control, the method prescribed under section 19(g)(4) is unreasonable, unfair, and cannot be sustained."

Benner-Coryell Lumber Co. v. *Unemployment Compensation Board* (Indiana Supreme Court), 29 N. E. (2d) 776, under the same factual situation, cites and follows the *Independent Gasoline Company* case, supra.

Aside from the question of stock ownership, the tax on a corporation operating 20 stores amounts to $1842.00 per year; whereas the court adjudged the defendant Southwestern Gas and Electric Company liable for $10,116.40 per year for 20 stores.

Aside from the question of stock ownership, the tax on a corporation operating 35 stores amounts to $5599.00 per year; whereas the court adjudged the defendant West Texas

Utilities Company liable for $17,703.70 per year for 35 stores.

Aside from the question of stock ownership, the tax on a corporation operating 45 stores amounts to $10,897.00 per year; whereas the court adjudged the defendant Central Power and Light Company liable for $22,762.00 per year for 45 stores.

The judgment of the court was arrived at by first adding together the number of stores operated by the three defendants, calculating the tax on this number as one chain, and then allocating to each defendant that portion of the total tax as the number of stores of each defendant bears to the total number of stores.

We say this results in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Any corporation owning and operating the same number of stores as either of the Appellants, a majority of whose stock is not held by a corporation which likewise holds a majority of the stock of another corporation owning and operating stores would, as shown above, pay a much less sum per store than that adjudged against these Appellants.

To further illustrate. Southwestern Gas and Electric Company with 20 stores, except for the fact that a majority of its stock is held by Central and South West Utilities Company, would only pay $92.10 per store, whereas merely because Central and South West Utilities Company owns a majority of its stock (a matter over which it has no control), it is adjudged liable for $505.82 per store.

The additional tax should be against the corporation which "controls" rather than against the "controlled" corporation; otherwise the Act, as applied to the three corporation defendants, is invalid.

We wish to point out that *H. E. Butt Grocery Company, et al.* v. *Geo. H. Sheppard, et al.*, 311 U. S. 608, appeal dis-

missed by this court, is clearly distinguishable from the instant case. No Federal question was raised in the Butt case, and furthermore in the Butt case the tax had been paid, the suit was for a recovery and the petition did not allege by whom the tax had been paid. See Court of Civil Appeals opinion 137 S. W. (2d) 823. In the instant case the tax has not been paid; it has been adjudged against the "controlled" corporations, and the Federal question was raised in the trial court and preserved in the appellate courts, as above shown.

VI.

Opinion Appended.

Copy of the opinion of the Court of Civil Appeals (unofficially reported 165 S. W. (2d) 920) is attached as Appendix "A."

Dated this the 1st day of March, 1943.

CENTRAL POWER AND LIGHT COMPANY,
WEST TEXAS UTILITIES COMPANY,
SOUTHWESTERN GAS AND ELECTRIC COMPANY,

By FRANK M. KEMP,
Of Corpus Christi, Texas,

J. M. WAGSTAFF,
Of Abilene, Texas,

RICHARD N. ARNOLD,
Of Texarkana, Texas,

LOONEY & CLARK,
Of Austin, Texas,

By EVERETT LOONEY,
711 Brown Building,
Austin, Texas.
Their Attorneys.

APPENDIX "A".

Opinion of Court of Civil Appeals.

(Reported 165 S. W. (2d) 920.)

No. 9299.

CENTRAL POWER AND LIGHT COMPANY, et al., *Appellants*,

vs.

THE STATE OF TEXAS, *Appellee*.

Appeal from District Court of Travis County.

Chain Store Tax Law case (Chap. 400, p. 1589, G. L. 1st C. S. 44 Leg., 1935, V. S. P. C. Art. 1111d). The suit was by the State against three operating subsidiary public utility corporations: The CP&L (Central Power and Light Company, the SW (Southwestern Gas and Electric Company), and the WT (West Texas Utilities Company). Each of the defendants had paid the tax for the years 1936-1940 inclusive based upon the number of stores operated by each as separate chains. The suit was for the difference between the amounts paid and the amounts allegedly due based upon the total number of stores operated by the three defendants as a single chain, allocated in proportion to the number of stores operated by each, as in the Safeway Case (Safeway *v.* Sheppard, 158 S. W. 2d, 319, error ref.). The case was tried upon agreed stipulation and the State recovered the full amount sought. The three defendants have appealed.

Appellants have briefed the case under 9 points, which we will consider in somewhat different order than as presented.

Points 4, 6, 7, 8 and 9 have already been adjudicated adversely to appellants, and it is not the function of this court to reconsider them. See the Humble case (Humble *v.* State, 158 S. W. 2d, 336, error ref.). We will merely state these points and refer to the cases in which they were adjudicated.

Point 4 urges that the parent and not the subsidiary corporation is liable for the tax. The Safeway case expressly held that the language of Sec. 5 of the Act "• • • corporation • • • which is controlled or held with others by majority stock ownership," etc. "clearly imposes liability upon the subsidiary."

Points 6 and 7 are to the effect that the Act is unconstitutional because of indefiniteness in not providing: 6) who shall pay the tax, and 7) how it shall be allocated. These points were expressly adjudicated against appellants in the Butt (Butt *v.* Sheppard, 137 S. W. 2d, 823, error ref.) and Safeway cases.

Point 8 urges that the Act is violative of Art. VIII, Sec. 2 of the Texas Constitution providing that "all occupation taxes shall be equal and uniform upon the same class of subjects." This point was expressly adjudicated against the appellants in the Chain Store Tax cases (Hurt *v.* Cooper and McCraw *v.* Kress), 130 Texas 433.

Point 9 urges that the Act is violative of the due process and equal protection provisions of the Federal Constitution. This point was expressly adjudicated against appellants in the Chain Store Tax and Safeway cases.

Point 1 urges that the suit is not maintainable "because the Act requiring licenses for the operation of stores (Chain Store Tax Law (does not create a debt and give a remedy by civil action."

We overrule this point upon the holding that the State's right to maintain this suit as a civil action is expressly conferred by Arts. 7076, 7076a and 7078a V. A. C. S.

Art. 7076 confers upon the Attorney General the power to bring suit in the name of the State to recover "the penalties provided for by this chapter (Chapter 2 of Title 122)." It also authorizes the State Tax Board to bring suit in the name of the State for the recovery of "any taxes or penalties provided for by this chapter • • • found at any time to be delinquent." It authorizes the State Tax Commissioner "to request and receive the assistance of the Attorney General" and the heads and employees of all state departments "to aid in the speedy recovery of such money or penalties due the State under the terms of this chapter." It requires all departments and agencies of the state gov-

ernment "which are now, or may be charged with the administration and collection of State taxes and license fees, to certify to the State Tax Commissioner * * * the fact of such delinquency * * *. The venue and jurisdiction of all suits arising hereunder is hereby conferred upon the courts of Travis County."

Art. 7076 was reenacted with amendments by Chap. 192, p. 581, Gen. Laws 44th Leg. (1933). This chapter also enacted Art. 7076a, the pertinent portions of which read:

"It is further specifically provided that all of the provisions of this Act shall apply and be applicable to all delinquent State taxes due and owing to the State of Texas, of every kind and character whatsoever, including all franchise, occupation, gross receipts, gross production, gross premiums tax on insurance companies, inheritance, gasoline, excise and all other State taxes which become delinquent other than State ad valorem taxes on property. It is hereby declared to be one of the purposes hereof to impose upon the State Tax Board the additional duty of collecting and aiding in the collection of all delinquent taxes enumerated and referred to herein, and all laws now applicable to the collection of such delinquent taxes, and all powers and authority now possessed by existing officers and agencies of the State Government are hereby, in addition, conferred upon said State Tax Board, as far as the same may be applicable * * *; provided further, that said State Tax Commissioner shall, after the passage hereof, be the chief administrative officer of this Act."

The caption of this chapter reads in part:

"An Act for the purpose of strengthening and providing for a stronger and more efficient administration and enforcement of all inheritance, occupation, gross receipts, gross production taxes, gross premiums taxes on insurance companies, gasoline, excise, sales, and all other State taxes, including intangible, and all character of delinquent State taxes other than ad valorem taxes on property."

The emergency clause of the Act recites:

"That by reason of the fact that there is much and unparalleled delinquency and an inadequate enforcement

of our present occupation, franchise, gross receipts, gross production, inheritance and other tax laws, and the further fact that it is imperative that said tax laws be strengthened, and that an adequate system of enforcement and collection of delinquent taxes be provided for, together with the fact that the government of the State of Texas is losing millions of dollars annually by reason of such condition, creates an emergency * * *."

Art. 7078a reads:

"The Comptroller of the State of Texas shall be ex officio Tax Commissioner of the State of Texas. He shall discharge all the duties placed upon the Tax Commissioner by any laws now or hereafter in force in this state."

This Section is Sec. 2 of Chap. 12, p. 645, Gen. Laws 46 Leg. (1939) which chapter in effect abolished the office of State Tax Commissioner and amended Art. 7078 by substituting the Attorney General for the State Tax Commissioner as a member of the State Tax Board.

The suit was brought by the State of Texas "acting by and through the Attorney Geenral of the State of Texas, at the instance and request of the Comptroller of Public Accounts of the State of Texas."

Reading the three Articles together (7076, 7076a, and 7078a) we think nothing could be plainer than that this suit was authorized and properly brought.

In Point 2 appellants contend that since all power and authority conferred by the Act was vested in the Comptroller, his action in accepting the lesser payments and issuing licenses to the respective defendants for the years in question is final and not subject to review. It is urged in this connection that his situation is analogous to that of boards of equalization in respect to valuations placed upon property under the ad valorem tax act (Art. 7212), citing State *v.* Ry., 263 S. W. 249.

There is no analogy between the two acts in this regard. The Chain Store Tax Law is plain, explicit and definite in fixing the absolute and exact amount of the tax. In this respect no discretion is vested in the Comptroller, and his

related acts are purely ministerial. He was without any authority to estop or otherwise bind the State in its right to the full amount of the tax as fixed by the Act, by accepting less amounts and issuing the licenses or by any other act of his. See Grayburg *v.* State, 50 S. W. 2d 355 (error ref.) and authorities there cited.

Point 3 urges that the WT was not properly included in the chain because a majority of its stock was not held in common ownership with that of CP&L and SW. The pertinent facts are these: The parent corporation (Central and Southwestern Utilities Company, a Delaware holding corporation(owned the majority of the stock in CP&L and SW, and in the APS (American Public Service Company, also a Delaware holding corporation). The latter owned the majority of the stock in the WT. The contention under this point is that ownership by the parent corporation of controlling stock in the APS, which in turn owned the controlling stock in the WT, did not constitute ownership of controlling stock in the WT. We cannot accept this interpretation of the Chain Store Tax Law. Control through majority stock ownership is potentially as effective mediately, through an intervening holding corporation, as immediately through ones own ownership. To hold otherwise would be to close ones eyes to realities and the obvious and invite evasion of the law by the organization of intermediary holding corporations for each subsidiary.

By Point 5 appellants contend that they are not subject to the tax because they are not taxed under Sec. 5 of the Act since they pay an occupation tax measured by gross receipts and because Sec. 5a is invalid in that it is not sufficiently embraced in the caption of the Act to meet the requirements of Art. III, Sec. 2 of the Constitution.

Sec. 5, which prescribes the character of businesses to which the Act applies and fixes the amount of the tax, provides that such businesses "shall not include • • • any business now paying an occupation tax measured by gross receipts."

The pertinent part of Sec. 5a reads:

"Every person, agent, receiver, trustee, firm, corporation, association and/or copartnership opening, establish-

ing, operating and/or maintaining one or more stores or mercantile establishments within this State under the same general management and/or ownership and selling therein any equipment or appliances operated and/or used in connection with any electrical current and/or natural gas and/or artificial gas, whether the same be in connection with the sale of electrical current and/or natural gas and/or artificial gas or not, and whether such person, firm, agent, receiver, trustee, corporation, association and/or copartnership be also engaged in the business of furnishing some public utility service or not shall pay the license fees herein above prescribed for the privilege of opening, establishing, operating and/or maintaining such stores or mercantile establishments * * *."

The pertinent part of the caption of the Act reads:

"An Act requiring licenses for the operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor. * * * providing for certain exceptions * * * *prescribing license fees for certain utility merchandising service* * * *. (Italics supplied.)

We overrule this point upon each of the following grounds:

1. If it be conceded (which it is not) That Sec. 5a is invalid on account of the insufficiency of the caption to include it, then that section is entirely eliminated and application of the Act to appellants should be considered as though Sec. 5a were not embodied therein. It is not contended (nor could it be) that appellants did not operate "stores or mercantile establishments" as defined in Sec. 5 of the Act. It was stipulated in the agreement upon which the case was tried that each defendant "operated and maintained within this state during all the times involved herein, stores and mercantile establishment in which goods, wares and merchandise of the following character only were sold at retail, to-wit: electric refrigerators, electric stoves, electric fans, electric lights and various other electrical appliances used only in connection with the use of

electric current. Such stores consisted of a room on the ground floor of a building with a door opening on the street, and in each of which stores the electrical appliances above mentioned were kept and displayed and offered for sale and sold at retail in connection with its main business, as aforesaid, and in the same room or place where its other business was transacted."

The pertinent exemption of Sec. 5 was of "any business now paying an occupation tax measured by gross receipts." The only occupation tax paid by appellants based upon receipts was that prescribed in Art. 7060 R.C.S., which was upon receipts only from electric light and power in incorporated cities of not less than 2,500 inhabitants according to the next preceding U. S. census. This was not a gross receipts tax upon the business of defendants in that it did not include receipts from business done outside the designated cities, and did not include receipts from any of its business, wherever done, other than the supplying of electric current. The term "measured by gross receipts" is all inclusive and excludes the concept of receipts measured by anything less than all business done.

A utility which did not operate or maintain a store or other business establishment where merchandise was sold, clearly did not come within the purview of the act. Where it operated stores for such sale, it paid no receipts tax upon that business. Consequently, it could not fall within the exception. The very purpose of the exception was to relieve from paying two occupation taxes, namely: a sale tax and a chain store tax upon the same merchandising business.

In the Chain Store Tax cases the Supreme Court had under consideration all the exemptions in Sec. 5 in connection with the question whether the Act was discriminatory. As regards this particular exemption the opinion reads:

"The fourth exemption is any business 'now paying an occupation tax measured by gross receipts.' Attention is directed to the fact that the word 'now' is used in that exemption. We need not consider the question of whether the mere fact that a given business is paying a gross re-

ceipts tax would justify its exemption from this tax. It appears that the only business which would be exempted under this provision is that of publishing and selling textbooks. With this explanation this exemption falls in the class of those just mentioned and will be upheld upon the same ground that they are upheld."

It is manifest that the Supreme Court did not regard an electric utility, which also operated stores within the meaning of the Act, as exempt by reason of the fact that it paid a gross receipts tax measured only by a part of its business in supplying electric current.

2. We think the caption sufficient to include Sec. 5a even if the words "prescribing license fees for certain utility merchandising service" were eliminated. The business described in Sec. 5a clearly comes within the wording of the caption, "operating * * * stores in this State." While the section was in effect merely cumulative of Sec. 5, in that its provisions were already included therein, its purpose may readily be explained as a clarification of the fourth exception in Sec. 5.

3. The words in the title "prescribing license fees for certain *utility merchandising service*" are not misleading but are fairly descriptive of the business of selling appliances in connection with the business of supplying electric current and other utility products by utility corporations. Appellants' contention to the contrary is predicated upon the assertion that the word "service" does not include "sale." While this may be true generally it is not universally so. The word has a variety of meanings, dependent upon the context, or the sense in which used; and in some instances includes a sale; for example the sale of food by restaurants is usually referred to as "service" although an actual sale is involved. See Goff v. Bank (Ark.) 298 S. W. 884.

Appellants cite the Humble case (Humble v. State, 158 S. W. 2d 336, error ref.) as holding that the word "servicing" in the phrase "servicing of motor vehicles" (Sec. 5 of the Act) does not include the sale of accessories. That was not the holding in the Humble case. The Humble con-

tended that "servicing of motor vehicles" had a well defined *trade meaning* in the filling station business and included the sale of motor vehicular accessories. The same as the *general* meaning of the term as applied to that business was contended for in the Standard case (Standard v. State, 142, S. W. 2d 519, error ref.). The Humble case held that the general meaning accorded with the trade meaning, and that the term, when accorded its general meaning, did include the sale of accessories. The exemption was denied in the Humble case upon the following interpretation of the Standard case holding:

"The decision in the Standard case is clearly grounded upon the proposition that the legislature had itself defined what it meant to imply by the quoted term, and that for the purposes of definition resort may not be had to the general meaning (nor, by parity of reasoning, to any other meaning) of the term nor to the practice of service stations in servicing automotive vehicles."

It is a matter of common knowledge that the practice of selling appliances to their customers in connection with supplying their products (electric current, gas, etc.) is quite general, if not universal, among public utility corporations. When such sales are so limited they are held to be germane to the business of supplying these products and not ultra vires the corporate powers. San Antonio P. S. Co. v. State, 62 S. W. 2d 585, affirmed and opinion adopted 69 S. W. 2d 38. "service" is just as appropriate a descriptive word of this practice as it is to supplying (by sale) of appliances to users of utility products as it is to supplying (by sale) of automotive accessories to purchasers of gasoline at filling stations.

The Humble opinion adverts to use of the definition of the verb "service" given in the 1934 edition of Webster's International Dictionary, and cited by appellant in the Standard case: To perform services of maintenance, *supply,* repair, installation, distribution, etc., for or upon; as, to service a car, a radio set, a ship, a territory. (Emphasis added.) The same authority gives 30 different definitions, besides numerous sub definitions, of the noun "service",

among them: 16a. Supply of needs; use; also formerly utility; as for the service of customers. 19. Act or means of *supplying* some general demand; provision, organization, or *apparatus* for conducting some public utility, as, gas, railway, telephone, or water *service*. The use of the word in this sense is but a form of metonymy in which the effect (rendition of a service) is used for the cause (sale of utility merchandise); the service consisting in supplying a need incident to the use of the utility product dealt in, but for which such supplying would be ultra vires the utility corporation.

We have for definition not "service" in the abstract, nor in its general sense, but "merchandising service", and that of a limited character: "utility merchandising service." "Merchandise" (the verb) means to trade, buy and sell articles of commerce. It connotes both the act of buying and selling and the thing bought or sold. The expression "utility merchandising service" appeals to us as peculiarly apt in describing the particular merchandising practice in which defendants were engaged; that of supplying their customers (by sale) with appliances (articles of merchandise) that were serviceable in connection with the consumption of the product of defendants' authorized business.

It may be observed that Point 5 (as well as some of the other points) challenges the validity as to them of the entire tax, not merely as to the amounts in suit. It is interesting to note, in this connection, that it has taken the defendant corporations over five years to discover that the Chain Store Tax Law does not apply to them by reason of their exemption under Sec. 5 and the invalidity of Sec. 5a because of insufficiency of the caption of the Act. Their own construction of the Act as applied to them by voluntary payment of the tax accords with our view of its correct construction.

The trial court's judgment is affirmed.

JAMES W. MCCLENDON,
Chief Justice.

Judgment of trial court affirmed October 28, 1942.
Rehearing denied November 18, 1942.

APPENDIX "B".

Court Rules.

Texas Rules of Practice and Procedure in Civil Actions.

Rule 458. Motion for Rehearing.—Any party desiring a rehearing of any matter determined by any Court of Civil Appeals may, within fifteen days after the date of rendition of the judgment or decision of the court, or the filing of the findings of fact and conclusions of law, whether such date be in the same or a succeeding term of said court, file with the clerk of said court his motion in writing for a rehearing thereof, in which the assignments of error relied upon for the rehearing shall be distinctly specified, and the name and residence of the counsel of the opposing party, if known, and if not known, then the name and residence of the opposing party as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so he shall accompany his motion with, or furnish to the clerk on his request, a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 460. Failure to supply such copies on request of the clerk may result in a dismissal of the motion.

Rule 468. Filing of Application for Writ of Error.—The application shall be filed with the clerk of the Court of Civil Appeals within thirty days after the overruling of the motion for rehearing, provided, when the thirtieth day falls on Sunday or a legal holiday the petition may be filed on the next day following which is neither a Sunday nor a legal holiday.

Rule 472. Forwarded to Supreme Court. When an application for a writ of error to the Supreme Court is filed with the clerk of a Court of Civil Appeals, he shall note upon his record the filing of said petition, and promptly forward the same to the clerk of the Supreme Court with the original

record in the case and the opinion of the Court of Civil Appeals, the motions filed therein, certified copies of the judgment and orders of the Court of Civil Appeals, and a copy of the appeal or the supersedeas bond of the appellant.

Rule 473. Petition with Record. The petition with the original record in the case, and the opinions of the Court of Civil Appeals, and the motion filed therein, and certified copies of the judgments and orders of the Court of Civil Appeals and copy of the appeal or supersedeas bond shall be filed with the Supreme Court. The party applying for the writ of error shall deposit with the clerk of the Court of Civil Appeals a sum sufficient to pay the expressage or carriage of the record to and from the clerk of the Supreme Court, which sum shall be charged as costs of suit.

Rule 484. Where Application Dismissed or Refused. When the application shall have been filed for a period of ten days, if the court determines to refuse or dismiss the same, whether the respondent has answered or not, the clerk of the court will retain the application, together with the transcript and accompanying papers, for fifteen days from the date of rendition of the judgment refusing or dismissing the writ. At the end of that time, if no motion for rehearing has been filed, or upon the overruling or dismissal of such motion, in case one has been filed, the clerk of the Supreme Court shall transmit to the Court of Civil Appeals to which the writ of error is sought a certified copy of the orders denying or dismissing such application and of the order overruling the motion for a rehearing thereof, and shall return the papers which belong to that court to the clerk thereof, but shall retain the application for writ of error.

Rule 515. Motion for Rehearing. A motion for rehearing may be filed with the clerk of the court within fifteen days after the date of rendition of the judgment or decision of

the court or the order refusing or dismissing an application for writ of error, whether such date be in the same or a succeeding term of such court, and not later; provided, however, that the court in cases of emergency where the ends of justice require it, may deny the right to file such motion. The grounds relied upon for the rehearing shall be distinctly specified in the motion. The motion shall give the name and residence of the counsel of the opposing party if known, and if not known, the name and residence as shown in the record. The party filing such motion shall deliver or mail to each opposing party, or his attorney of record, a true copy of such motion, and shall note on the motion so filed with the clerk that such copies have been so furnished. Upon his failure to do so, he shall accompany his motion with or furnish to the clerk on his request a sufficient number of duplicates or copies thereof for the clerk to use in complying with the provisions of Rule 516. Failure to supply such copies on request of the clerk may result in dismissal of the motion.